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REC'D TN
REGULATORY AUTH.

Guy M. Hicks
General Counsel

JUN 13 1999 PM 3 47

OFFICE OF THE
EXECUTIVE SECRETARY

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Tariff to Offer Contract Service Arrangement TN98-6303-01*
Docket No. 99-00262

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Opposition to Petitions to Intervene. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: ***Tariff to Offer Contract Service Arrangement TN98-6303-01***

Docket No. 99-00262

BELLSOUTH TELECOMMUNICATIONS, INC.'S
OPPOSITION TO PETITIONS TO INTERVENE

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully opposes the "petitions to intervene" filed by the Southeastern Competitive Carriers Association ("SECCA"), NEXTLINK Tennessee, Inc. ("NEXTLINK"), and Time Warner Telecom of the Mid-South, L.P. ("Time Warner") (collectively "Petitioners"). Time Warner's Petition does not allege any facts to support its claims, while NEXTLINK's and SECCA's Supplement to Petitions to Intervene alleges facts that have nothing to do with the CSA at issue.¹ The Authority should not hold up approval of a CSA, and thereby deny the customer the benefit of lower prices, based solely upon such unsubstantiated and irrelevant allegations.² Accordingly, consistent with the Supreme Court's decision in *Consumer Advocate Division v. Greer*, 967 S.W.2d 759 (1998), the "petitions to intervene" must be denied.

¹ Oddly, NEXTLINK and SECCA filed their "Supplement to Petitions to Intervene" on May 10, 1999 and their Petitions to Intervene three days later, on May 13, 1999.

² The regulatory game in which Petitioners are engaged is graphically illustrated by Time Warner's decision to withdraw its request to intervene in Docket 99-00230 so as not "strain relations" with the CSA customer who also happens to be a customer of Time Warner. Apparently, Time Warner is willing to overlook any concerns about BellSouth's CSAs in the name on preserving customer relations, which suggests that such concerns are more a matter of regulatory convenience than competitive necessity. Furthermore, Time Warner's decision to withdraw its request for intervention in Docket 99-00230 in order to save face with the customer is disingenuous, given that Time Warner is also a member of SECCA, which continues to pursue intervention in that case.

II. DISCUSSION

A. Time Warner's Petition to Intervene Should Be Denied Because Time Warner Does Not Allege Any Facts In Support Of Its Claims, As Required By The Authority's Rules.

The Tennessee Rules of Civil Procedure require that a party plead the factual basis of its claims. *See W & O Construction Co., Inc. v. Smithville*, 557 S.W.2d 920 (Tenn. 1977) (affirming dismissal of complaint that failed to state the facts upon which claims for relief were based); *Smith v. Lincoln Brass Works, Inc.*, 712 S.W.2d 470 (Tenn. 1986) (affirming dismissal of complaint that lacked any “averments of fact”). As the Tennessee Supreme Court has held, “a mere listing of a series of theories of recovery does not, in and of itself, state a cause of action.” 557 S.W.2d at 922. The Authority’s rules embody these pleading requirements, expressly providing that formal complaints “must contain in clear and logical form the allegations, statements *and facts relied upon, the fact or thing done or omitted*, together with a citation to any statutory, order or rules and regulations of this [Authority]” Rule 1220-1-1-.05(1) (emphasis added).

Even though the Authority’s rules require a party filing a complaint or seeking a hearing to allege facts, Time Warner has made no serious effort to do so. While Time Warner’s “Petition to Intervene and Complaint for Contested Case Proceeding” contains conclusory allegations sprinkled with passing references to the Tennessee Code, it does not allege a single fact of any sort upon which Time Warner’s legal claims are based. Time Warner’s “Petition” is nothing more than “a mere listing of a series of theories of recovery,” which requires that the petition be denied.

For example, Time Warner alleges upon “information and belief” that “the prices offered pursuant to this CSA by BST to its business customer is [sic] lower than the statutory price floor

permitted by Tennessee Code Annotated § 65-5-209 [sic].” Petition ¶ 4. Although actually set forth in Section 65-5-208(c), Time Warner does not allege in what respect the “prices” under this CSA violate the requirement that the price for an incumbent’s competitive services must exceed “the Incumbent Local Exchange Company’s tariffed rates for essential elements utilized by Competing Telecommunications Service Providers plus the total long-run incremental cost of the competitive elements of the service.” BellSouth has provided the Authority with supporting cost data demonstrating that the prices at which service is being offered under the CSA exceed the price floor over the life of the contract, and, to BellSouth’s knowledge, the Staff has not expressed any concern about BellSouth’s cost data.³ Time Warner must do more than baldly assert a violation of law in order to warrant the convening of a contested case.⁴

Time Warner also regurgitates the same claim presently pending in Docket 98-00559 that BellSouth’s CSAs are discriminatory because they allegedly are not offered to similarly situated business customers. Petition ¶ 6. Even putting aside the inappropriateness of litigating the same issue in two proceedings, Time Warner offers no facts to support such allegations. For example, who are these alleged “similarly situated” business customers who Time Warner contends have not been offered this CSA? Which customers have been denied “access to such telecommunication services at comparable rates and on the same terms and conditions,” as Time Warner alleges? The Petition does not say, and BellSouth and the Authority are left only to speculate as to who and what Time Warner has in mind.

³ Revised cost data were submitted to the Authority on May 25, 1999. Copies of the revised data have been provided to counsel for the Petitioners.

⁴ Although complaining about the “veil of secrecy” allegedly surrounding BellSouth’s CSAs, Time Warner was given access to all proprietary information associated with this CSA, including the underlying cost data. *See* May 4, 1999 Letter from Guy M. Hicks to Henry Walker and Charles B. Welch (copy attached as Exhibit 1). Accordingly, any suggestion that Time Warner has been denied the opportunity to “review” this CSA is false. Amended Petition ¶ 7. Furthermore, by virtue of having

Time Warner cannot be excused from its failure to state the factual basis for its claims as required by the Authority's rules. As the Tennessee Supreme Court recently made clear, the Authority's rules setting forth the requirements for formal complaints and petitions are mandatory. *See Consumer Advocate Division v. Greer*, 967 S.W.2d 759 (Tenn. 1998). The "Amended Petition" provides insufficient notice of the facts at issue, and allowing this case to proceed based upon such "vague and nonspecific" allegations would prejudice BellSouth. *See id.* at 763 (noting the "important function" served by the "specificity required of a complaint by the rules of the TRA"); *see also Jasper Engine & Transmission Service v. Mills*, 911 S.W.2d 719 (Tenn. Ct. App. 1995) ("The adverse party is entitled to have sufficient notice to inform him of the allegations he is called upon to answer"). Time Warner's Petition should be denied.⁵

B. NEXTLINK and SECCA's "Petitions to Intervene" Should Be Denied Because The Facts Alleged Are Irrelevant To The Particular CSA At Issue.

In an attempt to distract the Authority's attention from the CSA at issue, SECCA and NEXTLINK complain about a marketing initiative implemented by BellSouth in 1996 called the "Premier Customer Program." Supplemental Petition at 1-2. Relying upon documents produced by BellSouth in Docket 98-00559, NEXTLINK and SECCA request that the Authority convene a contested case to consider this CSA because, according to Petitioners, the Premier Customer Program was intended "to lock-up \$1 billion in local service revenue, half of the entire BellSouth local market, before local competition could get a foothold." Supplemental Petition at 2.

access to all of the underlying cost data, Time Warner's failure to allege the factual basis for its price floor argument is inexcusable.

⁵ The only other allegation offered by Time Warner in support of its request that the Authority convene a contested case to consider BellSouth's CSA concerns its contention that this CSA was part of a "business plan or policy" allegedly implemented by BellSouth "in 1995 or 1996 for the purpose of obtaining long-term commitments from its business customers in order to frustrate the efforts of competing telecommunications service providers to gain market share" This is the same issue raised by SECCA and NEXTLINK, and, as discussed in greater detail below, is nothing more than a red herring.

BellSouth's Premier Customer Program has absolutely nothing to do with the CSA at issue in this case, and NEXTLINK and SECCA do not seriously contend otherwise. Unlike the Volume and Term multi-state discount type agreement, the CSA in this docket is a service-specific CSA applicable in Tennessee only. Notably absent from NEXTLINK's and SECCA's Petition is any allegation that this CSA was entered into as part of the Premier Customer Program about which it so vociferously complains. This is not surprising given that the Premier Customer Program ended in 1997. *See* Document 000385, January 29, 1997 Letter from Joe A. Butler, Jr., (proposing participation in Premier Customer Program, noting that "the plan was effective through December 31, 1996⁶ and was extended to January 31, 1997. There are no plans to extend this offer past January 31, 1997.") (copy attached as Exhibit 2). Thus, SECCA and NEXTLINK are attempting to challenge a CSA based upon a program that ended two years before the CSA was even entered into.

NEXTLINK and SECCA attempt to bridge this obvious gap by claiming that the CSA at issue is "of the type described in BellSouth's Premier Customer Program" This is manifestly inaccurate. The CSA at issue in this proceeding is not even a volume and term CSA. It is a service-specific CSA. SECCA and NEXTLINK complain that the volume and term contracts offered under BellSouth's Premier Customer Program gave customers "'non-price incentives,' such as higher service levels, 'priority response' to business issues, and favored treatment regarding the offering of new products" Supplemental Petition at 2 (citations omitted). Even assuming such provisions are "unjust, unreasonable, discriminatory, and anticompetitive," (which BellSouth adamantly denies), the CSA at issue here, which is not a volume and term CSA, does not contain any of the non-price incentives to which Petitioners object.

⁶ The reference to December 31, 1997 is a typographical error and should read "December 31, 1996."

Furthermore, even though the Premier Customer Program has nothing to do with the CSA at issue and regardless of BellSouth's "intent" in implementing the program, SECCA and NEXTLINK conveniently ignore that BellSouth has never come close to having 50 percent of its business revenues under a volume and term contract, either in 1996 or any other year. Supplemental Petition at 1. This is clear from BellSouth's discovery responses in Docket 98-00559, which reflect the following:

<u>Year</u>	<u>Business Revenue</u>	<u>CSA Revenue</u>	<u>CSA % of Total Business</u>
1995	\$487,753,000	\$ 5,992,000	1.23
1996	\$543,911,000	\$13,667,000	2.51
1997	\$590,471,000	\$59,416,000	10.06
1998 YTD	\$489,068,000	\$50,958,000	10.42

BellSouth's Response to Consumer Advocate Division First Data Requests, Item No. 13 (filed October 14, 1998). Thus, the amount of revenue represented by BellSouth's CSAs at the end of 1996 accounted for far less than 3 percent of BellSouth's total business revenues, and even today is substantially less than the 50 percent figure referenced by NEXTLINK and SECCA.⁷

The only other allegation offered by NEXTLINK and SECCA in support of their request that the Authority convene a contested case to consider BellSouth's CSA concerns their statement that "cost and revenue projections filed by BST in this docket indicate that, in the third year of the proposed contract, BST will be providing service to this customer at less than cost." This CSA is a three-year offering, and BellSouth will more than cover its costs over the three-year period. As long as the revenues exceed the costs over the life of the agreement,

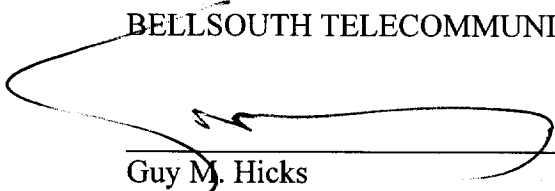
⁷ The 1998 data referenced above were as of October 14, 1998, the date BellSouth responded to the Consumer Advocate Division's discovery requests in Docket 98-00559. The end-of-year 1998 data were \$734,117,000 in total business revenues with \$75,251,884 (or 10.25%) in CSA revenue. Given that approximately 90% of BellSouth's business revenues and 100% of its residential revenues are not subject to a CSA, BellSouth can hardly be said to have "locked-up" the market by encouraging certain customers to enter into volume and term contracts.

NEXTLINK and SECCA have no basis for complaint, even if costs exceed revenue in a given year.

Notwithstanding their desire to divert attention from the CSA under consideration to a long-since expired marketing initiative that has nothing with the CSA at issue, Time Warner, NEXTLINK and SECCA have not alleged any relevant facts underlying their challenge to this particular CSA. Accordingly, Time Warner, NEXTLINK and SECCA's Petitions to Intervene should be denied.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



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Guy M. Hicks
General Counsel

May 4, 1999

Henry Walker, Esquire
Boult, Cummings, et al.
414 Union Ave., #1600
P. O. Box 198062
Nashville, TN 39219-8062

Charles B. Welch, Esquire
Farris, Mathews, et al.
511 Union St., #2400
Nashville, TN 37219

Re: *CSA TN98-2766-00*
Docket No. 99-00210

CSA TN98-6726-00
Docket No. 99-00230

CSA KY98-4958-00
Docket No. 99-00244

Gentlemen:

Consistent with our agreement this morning, I am enclosing a draft Protective Agreement for your review. The three CSA filing packages, including the proprietary information you have requested to review, will be made available for your inspection immediately upon your execution of the Protective Agreement.

Please let me know if you have any questions or comments with regard to the draft Agreement. Otherwise, please sign and fax the signature pages to me at 214-7406.

Very truly yours,



Guy M. Hicks

GMH:ch

cc: David Waddell (by fax)

Exhibit 1



BellSouth Business Systems, Inc.
333 Commerce Street
Nashville, TN 37201-3300

January 29, 1997

Dear [REDACTED]

Our customers have told us they are looking for a telecommunications service provider that offers reliable services that are competitively priced, easy to do business with and allows one-stop shopping. BellSouth is changing to meet these needs!

The Premier Customer Program is one plan BellSouth developed to show [REDACTED] our valued customer, how we are evolving to become your strategic partner. The features of the Premier customer Program include:

- ♦ Enhanced Business Relationship
- ♦ Rewards for Loyal Customers
 - Savings on many services
- ♦ Incentives to Buy Additional Services
 - the more you buy, the larger the savings
- ♦ Continued Account Team support
 - Highly trained technical assistance and expertise
- ♦ One-stop shopping
 - A full range of voice and data services
- ♦ Risk Avoidance
 - Stability and continuity in a rapidly changing market

[REDACTED] and its associated Stores are very important customers. During 1996, BellSouth provided services in our nine state region to you which resulted in over \$ 600,000 in annual billing. This represents an increase of approximately 30 % over 1995.

With your acceptance by January 31, 1997, [REDACTED] can begin to realize the numerous benefits of the Premier Customer Program. I will fax and mail copies of a two (2) year offer at a 4% discount on discount eligible services and a three (3) year offer at a 5.5% discount on discount eligible services.

000385

Exhibit 2



Please note that this offer also includes a trial of BellSouth's Voice Conferencing Services with 500 free minutes under the 3 year plan and 250 free minutes of use under the 2 year plan. I will provide more information to Raymond Maulino on this Service.

Again, I apologize for the short notice, but the plan was effective through December 31, 1997 and was extended to January 31, 1997. There are no plans to extend this offer past January 31, 1997.

Please call me at my office or at home to discuss terms of the agreement. I will be traveling on Jan 31st but will be checking my voice mail.

Home (615) 754-8120

Office (615) 401-4354 w/Voice Mail

Sincerely,

Joe A. Butler Jr.

Joe A. Butler Jr.

Attachment

000386

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 1999, a copy of the foregoing document was served on the parties of record, via the method indicated:

- ☒ Hand
☐ Mail
☐ Facsimile
☐ Overnight

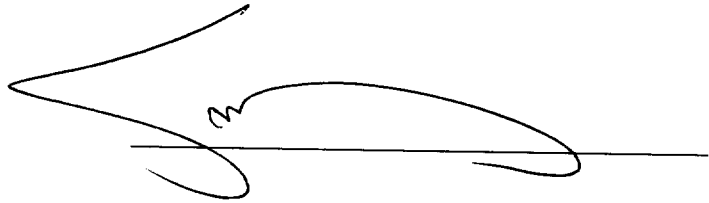
Richard Collier, Esquire
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0500

- ☐ Hand
☐ Mail
☒ Facsimile
☐ Overnight

Henry Walker, Esquire
Boult, Cummings, et al.
414 Union Ave., #1600
P. O. Box 198062
Nashville, TN 39219-8062

- ☐ Hand
☐ Mail
☒ Facsimile
☐ Overnight

Charles B. Welch, Esquire
Farris, Mathews, et al.
511 Union St., #2400
Nashville, TN 37219

A handwritten signature in black ink, appearing to be "Charles B. Welch", written over a horizontal line.